0 4 5

FILED
THOMAS D. HALL
FEB 15 2001
CLERK, SUPREME COURT
BY

IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO1-95

DALE EDWARD SJUTS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General

RICHARD L. POLIN
Florida Bar No. ***0230987***
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite ***950***
Miami, Florida ***33*** **13**1
*(305)*377-5441
(305)377-5455 (fax)

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The State of Florida, by and through the Office of the State Attorney of the Tenth Circuit, filed a petition seeking the involuntary civil commitment of Dale Edward Sjuts, pursuant to the sexually violent predators act, section 916.31, et **seq.,** Florida Statutes (Supp. 1998).[1] (Pet, **App.** 2).[2] The petition sought Sjuts's commitment for long-term control, care and treatment. Id.

Counsel for Sjuts, the Office of the Public Defender, filed an answer to the petition, and an affirmative defense and four "counterclaims." Id. The predicate for the first two counterclaims was the allegation that Dr. Alan J. Waldman, apsychiatrist under state contract, "had coerced him into submitting to a mental health examination which later supplied some of the allegations in the State's petition." Id. The first two counterclaims were directed against Dr. Waldman and the State, and were based on 42 U.S.C. §1983, alleging violations of Sjuts's civil rights, and seeking monetary damages from Dr. Waldman, attorney's fees, and an injunction against the State's use of the examination. Id. at ***2-3.***

The Office of the Attorney General appeared on Dr. Waldman's behalf, and

---

[1] Effective May **26,** 1999, the act was amended and transferred to section 394.910, et seq., Florida Statutes (1999).

[2] "Pet. App." refers to the Appendix to the Petitioner's Brief on Jurisdiction.

moved to dismiss the counterclaims, on the grounds that the public defender had no authority to file such civil actions on Sjuts's behalf. Id. at 3. The trial court dismissed the counterclaims and the Second District affirmed that ruling. Id. at 3-4.

First, the Second District held that the public defender "exceeded his statutory authority when filing the counterclaims, which did not entail a defense against State action that threatened Sjuts's liberty interest. Rather, these claims sought monetary damages for the alleged deprivation of Sjuts's rights to be free of unlawful searches and detentions, and injunctive vindications of those rights." Id. at 3.

However, the Court found that that would not provide a basis for dismissal of the claims, as the claims could, in theory, be presented by Sjuts, either on his own behalf or through other counsel, Id. Rather, the claims themselves were improper counterclaims in and of themselves. As they were directed against a non-party, Dr. Waldman, they were third-party claims, rather than counterclaims. Id. at 4. The Court then explained that the claims would not be viable as either third-party claims or counterclaims:

> Further, the claims against Dr. Waldman were not proper counterclaims because he was not an opposing party in the underlying litigation. See Fla. R. Civ. P. 1.170. Nor could these counterclaims be characterized as third party actions. Sjuts did not contend that Dr. Waldman owed any part of Sjuts's "liability" to the State. Nor did Dr. Waldman's alleged impropriety "arise out of the

> transaction or occurrence that [was] the subject matter" of the State's petition, i.e., Sjuts's alleged criminal history and his supposed mental or personality afflictions that together would qualify him as a sexually violent predator under section 394.912(1) of the Act. . . .

(App. 4). The Court also held that a counterclaim against the State was improper because the State is not a proper defendant in a section 1983 action, which may proceed only as to named individuals acting under the color of state law. Id.

SUMMARY OF ARGUMENT

The lower Court's opinion does not expressly affect a class of constitutional officers - i.e., the Public Defenders. Although the opinion holds that the Public Defender exceeded statutory authority in pursuing, the Court further held that the so-called counterclaims or third-party claims would never be viable, no matter who presented them. Thus, neither the Public Defender, private counsel, nor a pro se litigant would ever be able to pursue such claims. Under such circumstances, the lower Court's opinion does not expressly affect Public Defenders.

ARGUMENT

THE LOWER COURT'S OPINION DOES NOT EXPRESSLY AFFECT **A CLASS** OF CONSTITUTIONAL OFFICERS.

The Petitioner claims that the ruling that the Public Defender lacks statutory authority to pursue civil actions for monetary damages impedes the Public Defender's ability to represent clients in involuntary civil commitment actions. Ultimately, however, that is an irrelevancy, since the claims at issue are claims which are never viable, whether as counterclaims or third-party claims, whether brought by a Public Defender, private counsel or a pro se litigant.

Initially, the State would note that the lower Court was clearly correct in holding that the Public Defender lacks statutory authority to represent clients in civil actions seeking monetary damages. This Court has repeatedly stated that with respect to the authority of both the Public Defender and the Capital Collateral Representative in criminal cases. State ex rel. Smith v. Jorandby, 498 So. 2d 948 (Fla. 1986); State ex rel. Smith v. Brummer, 443 ***So.*** 2d 957 (Fla. 1984); State ex rel. Smith v. Brummer, 426 **So.** 2d 532 (Fla. 1982); State exrel. Butterworth v. Kenny, 714 **So.** 2d 404 (Fla. 1998). While the principle that the Public Defender is limited to express statutory authority has been well recognized for the past 20 years, effective May, 1999, the legislature reemphasized this, when amending section 27.51(1)(d), Florida

Statutes (1999), to expressly add that

> a public defender does not have the authority to represent any person who is a plaintiff in a civil action brought under the Florida Rules of Civil Procedure, the Federal Rules of Civil Procedure, or the federal statutes, or who is a petitioner in an administrative proceeding challenging a rule under chapter 120, unless specifically authorized by statute.[3]

Furthermore, a Public Defender has no need to sue either a doctor or the State for monetary damages in order to represent a client in a commitment action. The only factors determining whether the person will be committed are the person's mental condition and dangerousness - i.e., likelihood of recidivism. Section 394.912, Florida Statutes (1999). If the State establishes that at the commitment trial, the person will be committed - either with or without the money of the doctor whom he is trying to sue. Thus, the ability to pursue monetary damage claims in no way assists the Public Defender in defending the liberty interests of the client at the commitment proceedings.

---

[3] Although this statute became effective May 26, 1999, after the filing of the petition and "counterclaims" herein, at no point in time has any statute authorized the Public Defender to file claims for monetary damages. Furthermore, to the extent that the Petitioner's argument focuses on the effect that the lower Court's opinion will have on the Public Defender's ability to represent its clients, the Petitioner's argument is future-oriented, and thus implicates the May, 1999 statutory amendments as well.

Although the claims herein were designated as "counterclaims," as Dr. Waldman was not a party to the commitment action itself, the claims were, in reality, third-party claims. It is well established that a third-party claim may be brought only if it is predicated on a theory of indemnity, contribution or subrogation - theories which render the third-party liable to the original plaintiff for part of the original defendant's responsibility to the plaintiff. Padovano, Civil Practice, at s. 71.7, pp. 191-93; Rupp v. Philpot, 619 **So.** 2d 1047 (Fla. 5th DCA 1993); Berman, Florida Civil Procedure, pp. 158-59 (West 1998 ed.). The claims herein were not based on theories of indemnity, contribution or subrogation. **As** such, there was no basis for any litigant to pursue the monetary damages against the doctor in the instant case, and that would be true whether Sjuts was represented by the Public Defender, private counsel, or himself.

Similarly, as noted by the lower Court, third party claims must "arise out of the transaction or occurrence that is the subject matter of the plaintiffs claim." Rule 1.180(a), Florida Rules of Civil Procedure. Claims that a doctor violated rights during a mental health examination do not arise out of the subject matter of the commitment petition. The petition is based solely on the person's current mental condition and current dangerousness. Those elements exist (or not) regardless of any claims of coercion during a mental health examination.

As the Public Defender could never bring claims of this nature, regardless of the existence of statutory authority as a Public Defender, the lower Court's opinion can not be said to expressly affect the Public Defenders as a class of constitutional officers. In Spradley v. State, **293 So.** 2d **697, 701** (Fla. 1974), this Court set forth the relevant standards for determining whether a decision affects a class of constitutional officers:

> . . . To vest this Court with certiorari jurisdiction, a decision must directly and, in some way, exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers,

The lower Court's decision does not "directly" affect the Public Defender since, regardless of the decision as to the scope of the Public Defender's statutory authority, the Public Defender would never be able to pursue non-viable claims, whether as counterclaims or third-party claims. The lower Court's opinion does not "exclusively" affect the Public Defender since the prohibition against pursuing such claims extends to private counsel and pro se litigants to the same extent that it applies to the Public Defender. **As** all litigants, and all counsel, are governed by the same limitations as to the types of third-party claims which may be pursued, the impact on the Public Defender is clearly not "exclusive." Thus, the lower Court's opinion does nothing more than tell the Public Defender to follow the same law and the same

principles that govern all other litigants and counsel in civil proceedings.

If, contrary to the clear legislative intent, the Public Defender is granted a right to pursue such actions for monetary damages, a Pandora's box will clearly be opened: a) malpractice on the part of the Public Defender in a civil action could result in civil, monetary liability on the part of the State; b) the pursuit of such claims by the Public Defender could subject the Public Defender to third-party claims by the doctors, whether for abuse of process or some related theory; c) as the proceedings herein are civil, the Public Defender could be the subject of an award of attorneys fees under section 57.105, which might ultimately have to be paid by the State. This Court, and the legislature, have thus acted appropriately in the past in constraining the Public Defender within the limits of statutory authority. However, as noted above, since the lower Court's opinion does not directly and exclusively affect the Public Defender as a class of constitutional officers, there is no basis for accepting this case for further review.

CONCLUSION

Based on the foregoing, this Court should decline to accept this case for further review.

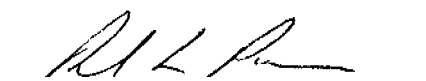
Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed this 12th day of February, 2001, to DEBORAH K. BRUECKHETMER, Assistant Public Defender, Office of the Public Defender, Polk County Courthouse, P. O. Box 9000 - Drawer PD, Bartow, FL 33831.



RICHARD L. POLIN

CERTIFICATE REGARDING FONT SIZE AND TYPE

The foregoing Brief of Respondent on Jurisdiction has been typed in Times New Roman, 14-point type.

RICHARD L. POLIN